Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

JAMES EDWARD DEMOSS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JAMES EDWARD DEMOSS
TDCJ-ID #894554
Robertson Unit
12071 FM 3522
Abilene, Texas 79601
Petitioner Pro se

QUESTIONS PRESENTED

(1) IS IT BRIBERY FOR A POLICE OFFICER TO BE PAID BY AN INFORMANT TO OBTAIN AND EXECUTE A SEARCH WARRANT ON A SPECIFICALLY TARGETED CITIZEN?

(2) WAS PETITIONER AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY ARGUE THE MOTION TO SUPPRESS?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

James Edward Demoss, Petitioner, pro se, respectfully prays that a writ of certiorari issue to review the judgment and opinion issued by the Fifth Circuit Court of Appeals on July 23, 2003, which refused to reverse and remand the denial of his Petition for Writ of Habeas Corpus.

OPINIONS BELOW

A copy of the District Court's opinion appears in Appendix B and the District Court's denial of a certificate of appealability in Appendix C. A copy of the Fifth Circuit Court of Appeals denial of a COA appears in Appendix A and the Fifth Circuit's opinion on rehearing appears in Appendix D. The text of United States Constitution Amendments IV, VI & XIV appears as follows: Amendment IV in Appendix E; Amendment VI in Appendix F; and Amendment XIV in Appendix G. The text of Article 38.23 of the Texas Code of Criminal Procedure appears in Appendix H and the pertinent part of the Texas Penal Code 36.02 (Bribery) appears in Appendix I.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Fifth Circuit Court of Appeals denied petitioner's timely filed Motion for Reconsideration on September 23, 2003.

CONSTITUTIONAL PROVISIONS INVOKED

The text of the United States Constitution Amendments IV, VI & XIV are set forth in Appendices E, F & G.

STATEMENT OF THE CASE

Petitioner was convicted on two counts of aggravated sexual assault of a child, and two counts of indecency with a child, and two counts of sexual performance by a child. (State v. Demoss, no. 98-CR-1103; 227th Dist. Ct., Bexar County, March 17, 1998). Petitioner was sentenced concurrently to two life sentences on each aggravated sexual assault and four, twenty-year sentences on the remaining counts. The Fourth Court of Appeals reversed and rendered acquittals to both counts of indecency with a child, but affirmed the other convictions. (Demoss v. State, 12 S.W.3d 553, 558-560 [Tex.App. – San Antonio 1999, pet. ref'd]). A State petition for discretionary review was refused (0556-00), and petitioner filed an application for habeas corpus. After denial of the State habeas (Ex parte Demoss, no. 49,920-1, denied Aug. 15, 2001), petitioner sought relief under 28 U.S.C. §2254. (Demoss v. Cockrell, no. SA-02-CA-139-IV). The Federal habeas petition was dismissed on March 21, 2003 and petitioner requested a certificate of appealability which was denied on July 23, 2003. A motion for reconsideration was denied September 19, 2003. Both questions presented to this Honorable Court have been fairly presented to each of the lower courts mentioned above.

A police officer was paid by a cable company to obtain a search warrant and search petitioner's home. During the search the officer found photographs that led to another

search warrant being issued and the eventual arrest and conviction of petitioner. Petitioner claims this first search was illegal because it was bribery for the police officer to be paid to perform his sworn duty and the exclusionary rule prohibits the admission of any evidence stemming from the second search.

REASONS FOR GRANTING THE WRIT

Petitioner was entitled to the effective assistance of counsel at trial. U.S. Const. Amend. VI and XIV; *Powell v. Alabama*, 53 S.Ct. 55 (1932). To prevail on an ineffective assistance of counsel claim, a habeas petitioner must satisfy *Strickland's* familiar two-part test. *Strickland v. Washington*, 104 S.Ct. 2052 (1984).

Johnny Abrego for Paragon Cable Company testified that he paid Officer Jones to obtain and serve search warrants to confiscate illegal cable boxes. A person commits bribery if he accepts any benefits as consideration for exercise of official discretion. Tex.Pen.Code 36.02; Fed.Pen.Code 18 U.S.C. 201. This statute was designed to insure the integrity, fairness and impartiality of the administration of law. *Bates v. State*, 587 S.W.2d 121 (Cr. App. 1974); *Mustard v. State*, 711 S.W.2d 71, 75 (Tex.App – Dallas 1986, pet. ref'd) ("The offense of bribery focuses on the mental state of the actor, and is complete if a private citizen by offering, conferring, or agreeing to confer intends an agreement.").

From the moment Officer Jones accepted money from Paragon Cable to target specific citizens, the entire process is a violation of State and Federal law and the due process guaranteed by the United States Constitution. The

Texas Code of Criminal Procedure, article 38.23, excludes any evidence obtained in violation of provisions of the United States or Texas Constitutions or the laws of the United States or the State of Texas. The primary purpose of article 38.23 is to deter unlawful police conduct. *Drago v. State*, 553 S.W.2d 375, 378 (Tex.Crim.App. 1977).

Other judges when presented with the same situation as the instant case, properly suppressed the evidence seized. (See *State v. Hernandez*, cause no. 647901, Bexar County, Texas; and *State v. Mendez*, cause no. 646429, Bexar County, Texas). Hernandez and Mendez were police officers that were caught with illegal cable boxes, yet each case was dismissed because the evidence was suppressed. The fact of the cases are identical, but with different results because petitioner's counsel failed to properly argue the issue.

This Honorable Court held that the issuance of a search warrant violated the protection afforded the defendant by the VI and XIV Amendments to the United States Constitution where the Justice was paid a fee for issuing a warrant, where his financial welfare was enhanced. "It is in other words, another situation where the defendant is subjected to what surely is action by an officer of the court who has a direct personal substantial, pecuniary interest in his conclusion to issue or deny the warrant." *Connally v. Georgia*, 97 S.Ct. 546, 548 (1977). Petitioner cannot find any case law that makes an exception between an officer of the law and an officer of the court. If it is criminal conduct for a Justice to be paid to issue warrants, then it surely is criminal conduct for an officer of the law to be paid to obtain and serve search warrants. The decision of the lower courts are erroneous and this Honorable Court should grant certiorari and make it clear that there is no

distinction between a Justice and a police officer when it pertains to being bribed to perform your duty.

Defense counsel did not know the applicable law and his confusion was apparent. The trial judge at the hearing on the Motion to Suppress stated that Officer Jones being compensated by Paragon Cable did not take away from him being a police officer. That may be true but the court was missing the point, that it was criminal conduct for the officer to accept money to obtain search warrants against specific citizens named by Paragon Cable. Defense counsel did not argue the exclusionary rule or the bribery law, but instead delivered this (insightful?) rendition:

> MR. KREIDER: It does. It's like this sir. I was in the military. We had a boy who was killed while on duty. His tank blew up and he burned inside the tank. He was on duty. We buried him with honors. We had a boy who was killed while working for Dominoes Pizza. He was on duty for Dominoes Pizza. Okay he was working for them.
>
> THE COURT: What does this have to do with this case?
>
> MR. KREIDER: Well, Sir, because this is a paramilitary organization. (R.VOL. II, p. 34-35).

If that bit of "lawyering" confuses the Court, imagine petitioner's dismay to discover that his attorney believes the judicial system is a paramilitary organization. This is one of the many instances where counsel rambled and said nothing of merit. This conduct was not within the realm of trail strategy and defense counsel was ineffective for not conducting the factual investigation which would enable

him to make an intelligent response. Id. *Strickland, supra*, 104 S.Ct. at 2066.

All the evidence seized should have been ruled inadmissible under the exclusionary rule. Actual prejudice has been demonstrated because there is more than a reasonable probability that the verdict would have been different absent the excludable evidence. *Kimmelman v. Morrison*, 106 S.Ct. 2574, 2583 (1986). Denial of Certificates of Appealability are reviewable under *Hohn v. United States*, 118 S.Ct. 1969 (1998).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the Fifth Circuit Court of Appeals and the courts below to deny Petitioner a certificate of appealability in this matter.

Respectfully submitted,

JAMES EDWARD DEMOSS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50299
USDC No. SA-02-CV-139

JAMES EDWARD DEMOSS,

Petitioner-Appellant

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed Jul. 23, 2003)

ORDER:

James Edward DeMoss, Texas prisoner # 894554, requests a certificate of appealability (COA) to appeal the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. DeMoss also requests leave to appeal *in forma pauperis* (IFP). DeMoss' habeas corpus petition stemmed from his 1998 convictions for aggravated sexual assault of a child and inducing sexual performance by a child. DeMoss argues that the district court erred in rejecting his claim that he was denied the effective assistance of counsel in pursuing a motion to

suppress. DeMoss does not argue that the district court erred in rejecting his claims that he was denied the effective assistance of counsel during the guilt-innocence and punishment phases of trial; accordingly, those issues are waived. *See Hughes v. Johnson,* 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, DeMoss must demonstrate that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

DeMoss has failed to make the requisite showing. Reasonable jurists would not debate the district court's determination that DeMoss' counsel did not render ineffective assistance by failing to argue that the police officer who executed the search warrant of DeMoss' residence had committed "bribery." *See Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Sones v. Hargett,* 61 F.3d 410, 415 n.5 (5th Cir. 1995).

COA is DENIED. DeMoss' IFP motion is DENIED as unnecessary.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JAMES EDWARD DeMOSS,	§	
	§	
Petitioner,	§	**Civil Action**
v.	§	**No. SA-02-CA-139-IV**
JANIE COCKRELL, Texas Department of Criminal Justice Institutional Division Director,	§	
	§	
	§	
	§	
	§	
Respondent.	§	

MEMORANDUM DECISION

(Filed Feb. 11, 2003)

Before the Court is Petitioner James Edward DeMoss's 28 U.S.C. § 2254 Habeas Corpus Petition (Docket Entry # 2) and Respondent's Answer (Docket Entry # 9) seeking dismissal of the Petition which this Court construes as a motion to dismiss.

I.

In 1998, DeMoss was convicted by a Bexar County jury of two counts of aggravated sexual assault, two counts of indecency with a child by sexual contact, and two counts of inducing sexual performance by a child. *State v. DeMoss,* No. 98-CR-1103 (227th Dist. Ct., Bexar County, March 17, 1998). He was sentenced to concurrent terms of life on each of the aggravated sexual assault counts and four, twenty year sentences on each of the remaining

counts. *Id.* On direct appeal, the Fourth Court of Appeals affirmed DeMoss's convictions for aggravated sexual assault and inducing sexual performance by a child, but reversed his convictions for indecency with a child because these offenses were lesser-included offenses of the sexual assault counts. *DeMoss v. State,* 12 S.W.3d 553, 558-60 (Tex. App. – San Antonio 1999, pet. ref'd).

The Fourth Court of Appeals described the evidence as follows:

> . . . A.V., a thirteen year-old girl at the time of the offenses, was the complainant in each count. . . .
>
> James Jones was a San Antonio police officer, who also worked in his off-duty hours for Paragon Cable to recover illegal cable boxes. While working for Paragon, Jones received a tip from another Paragon employee that an illegal-cable box was present at DeMoss' [] address. Based on this tip, Jones obtained a search warrant to search DeMoss' [] residence. Jones executed the warrant in his off-duty hours, while working for Paragon. Jones was in plain clothes, but was accompanied by another off-duty police officer in uniform, Raul Alonzo. DeMoss was not at home at the time Jones and Alonzo executed the warrant, but A.V. was, and she allowed the men to conduct the search. Jones did not find a cable box near the television, so the men conducted a general search of the residence. During the search of the residence Jones discovered photographs in a shoe box in A.V.'s closet, which he considered to be child pornography. Jones and Alonzo terminated the search and left after securing the residence with on-duty police officers. Then, in his capacity as a San Antonio police

officer, Jones obtained a second search warrant to search for child pornography. Items found during the second search of DeMoss' [] residence and a third search of the residence next door resulted in the six charged offenses against DeMoss. The items, which included photographs and videos, were admitted during trial.

. . . .

. . . The evidence in this case established that DeMoss had numerous sexual contacts with the complainant beginning in November 1994, and that the sexual contacts occurred in Bexar County beginning in January 1996 and continued until DeMoss was arrested in July 1996. . . .

. . . A.V. testified that she and DeMoss engaged in numerous sexual activities in Bexar County from January 1996 until July 1996. A.V. testified in general terms regarding the sexual activity, stating that the two performed oral sex upon one another and engaged in intercourse, and that DeMoss engaged in sexual contact with her for sexual gratification. When asked whether "on or about February 28th, 1996, and on or about March 15th, 1996, did the defendant's penis penetrate your mouth," A.V. responded, "Yes, ma'am." When asked whether "on or about February 28th, 1996, and on or about March 15th, 1996, did the defendant's male sexual organ penetrate your female sexual organ," A.V. responded, "Yes, ma'am." . . .

DeMoss also testified in general terms, admitting he engaged in sexual contact with A.V. numerous times in Bexar County, he engaged in such activity for sexual gratification, and they engaged in oral sex and intercourse. . . .

DeMoss v. State, 12 S.W.3d at 555, 560 (footnote omitted).

DeMoss's state habeas corpus application was denied. *Ex Parte DeMoss*, No. 49,920-1 (*denied* Aug. 15, 2001).

II.

Federal habeas corpus relief is available only where the petitioner demonstrates he is in custody in violation of his constitutional or other federal rights. 28 U.S.C. §§ 2241, 2254. State law errors that do not implicate constitutional rights are not a basis for habeas corpus relief. *Estelle v. McGuire,* 502 U.S. 62, 67, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991). Rule 2(d) of the Rules Governing § 2254 Proceedings states the petition "shall set forth in summary form the facts supporting each of the grounds." Conclusory and speculative allegations are not sufficient to entitle a petitioner to a hearing or relief in a § 2254 case. *West v. Johnson,* 92 F.3d 1385, 1398-99 (5th Cir. 1996), *cert. denied,* 520 U.S. 1242 (1997); *Perillo v. Johnson,* 79 F.3d 441, 444 (5th Cir. 1996).

Section 2254(b)(1)(A) requires the petitioner to exhaust available State court remedies before seeking federal habeas corpus relief. Section 2254(d) requires this Court to defer to the State court's reasonable interpretations of federal law and reasonable determinations of fact in light of the evidence presented in the State proceedings. Factual determinations of a state court are "presumed to be correct" and the petitioner has the burden of rebutting this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

DeMoss's federal Petition contends his counsel was ineffective at trial and at sentencing. (Docket Entry # 2 at

2, 7.) To establish ineffective assistance of counsel, a petitioner must show counsel's performance was deficient, i.e. counsel's performance was not professionally reasonable, and counsel's deficient performance prejudiced the petitioner, i.e. "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-94, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 689. In order to demonstrate prejudice, a petitioner must show not only that had counsel acted in a different manner a new trial would have been granted, but also that, as a result of counsel's incompetence, the trial was rendered fundamentally unfair or unreliable. *Lockhart v. Fretwell,* 506 U.S. 364, 369-70, 113 S. Ct. 838, 112 L.Ed.2d 180 (1993). To show ineffective assistance of counsel in the context of a sentencing hearing "a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." *Spriggs v. Collins,* 993 F.2d 85, 88 (5th Cir. 1993).

- i -

DeMoss first contends his counsel was ineffective for failing to argue that Officer Jones' acceptance of outside employment at Paragon constituted "bribery" within the meaning of Texas Penal Code article 36.02 and thus the evidence Officer Jones obtained was in violation of Texas law and therefore should have been excluded pursuant to the Texas exclusionary rule. (Docket Entry # 3 at 6-9.)

DeMoss failed to furnish this Court with any authority that would support his argument a police officer's acceptance of other employment during his off-duty hours constitutes "bribery" within the meaning of article 36.02, and his argument that such employment amounts to "bribery" simply does not make sense. Furthermore, this argument relies on an interpretation of State law that was rejected by the state courts on appeal and in DeMoss's state habeas corpus application. *DeMoss v. State*, 12 S.W.3d at 555-57; *Ex Parte DeMoss,* No. 49,920-1 at 1039-40. In a habeas corpus proceeding, this Court defers to a state court's interpretation of state law. *See Creel v. Johnson,* 162 F.3d. 385, 390 (5th Cir. 1998) ("Absent a violation of the Constitution, we defer to the state court interpretation of its law"), *cert. denied*, 526 U.S. 1148 (1999). Because state law does not support this "bribery" argument, DeMoss's counsel was not ineffective for failing to raise this argument. *See Sones v. Hargett,* 61 F.3d 410, 414 n.5 (5th Cir. 1995) (holding counsel is not ineffective for failing to raise frivolous arguments).

- ii -

DeMoss next contends his counsel was ineffective for failing to object when the prosecution introduced a videotape depicting animal abuse. (Docket Entry # 3 at 9-10.)

When this issue was presented in DeMoss's state habeas corpus application, his former counsel, Everette F. Kreider, addressed this issue through his Affidavit as follows:

> . . . [A]pplicant [DeMoss] argues that trial counsel failed to object to a segment of a video displaying a scene of what several jurors

> described as "animal abuse" because trial counsel did not properly review all evidence against [A]pplicant.
>
> Applicant fails to specifically describe the video segment in his memorandum. I believe [A]pplicant is referring to a scene in which a snake is inserted into a woman's vagina. I was aware of this scene before the punishment phase because 1) [A]pplicant told me about it and 2) it is listed in item 22 . . . in State's Notice of Intent to Introduce Evidence . . . I gave a copy of this [Notice] to [A]pplicant.
>
> Applicant specifically described this video to me and stated it was an "art film." Applicant told me not to object to its presentation because the jury would understand its artistic value and not hold its content against [A]pplicant. Applicant further said he would explain the film to the jury if he felt it was being misinterpreted.

Ex Parte DeMoss, No. 49,920-1 at 983.

In state court and in this Court, DeMoss does not contest this statement or offer evidence to the contrary. His counsel was not deficient for failing to object to this evidence because he was specifically told not to by DeMoss. Furthermore, DeMoss failed to demonstrate this evidence would qualify for an extraneous offense objection and therefore failed to show his counsel was deficient on this account. "[C]ounsel is not required to make futile motions or objections." *Koch v. Puckett,* 907 F.2d 524, 527 (5th Cir. 1990). Furthermore, because DeMoss admitted to having sexual relations with A.V. and because of the weight of the evidence against DeMoss, he failed to show any possibility he was prejudiced by this evidence.

During sentencing the State presented testimony concerning an alleged vehicular assault by DeMoss in 1995. (*See* VIII Reporter's Record at 6-8.) DeMoss claims his counsel was ineffective for failing to object to this testimony as perjured. (Docket Entry # 3 at 10-12.) DeMoss claims he was working for an off-shore oil company at the time this alleged incident took place, and this could be proved through his employment records and "[c]ompany employees [who] were available to testify." *(Id.* at 11.) The affidavit of his former counsel, however, states DeMoss advised him his former employer in 1995 was a health care company which, when contacted several times by counsel for information, failed to respond. *Ex Parte DeMoss,* No. 49,920-1 at 985. DeMoss does not dispute his former counsel's account.

In *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001), the Fifth Circuit dismissed a similar argument as follows:

> "Complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified are largely speculative. Where the only evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution."
>
> . . .
>
> [Petitioner] does not, and did not below, explain what his counsel was (or should have been) aware of at the time of trial that should have caused him to call these unidentified witnesses or why the favorable witnesses (whoever they are) were not called. A prisoner's bald conclusory

> assertion that supposed "alibi" witnesses were not called does not serve to "overcome the strong presumption that his counsel's actions were reasonable."
>
> . . .
>
> [Petitioner] has never provided any court with affidavits (or similar matter) from any of the unidentified favorable witnesses suggesting what they would have testified to. It is clear that [Petitioner's] conclusory speculation about the effect of the unidentified favorable witness' testimony falls far short of the prima facie showing of prejudice necessary for the evidentiary hearing [Petitioner] requests.

Likewise, DeMoss failed to present any proof there were witnesses who could testify favorably, the identity of these witnesses, proof they were willing to testify for DeMoss, or that he advised his counsel of this; and absent such proof, there is no showing his counsel was deficient or DeMoss was prejudiced. *See id.*

- iv -

DeMoss also claims his counsel was ineffective for failing to present mitigating evidence at sentencing. (Docket Entry # 3 at 11-13.) DeMoss failed to show what "mitigating" evidence could have been presented – except that he taught first aid and was a Leon Valley Fire Department volunteer – or how such evidence would have been favorable to his case. Allegations that counsel failed to investigate and develop useful evidence are not sufficient to warrant a hearing or relief absent an "affirmative showing of what the missing evidence or testimony would have been" and an explanation "why it would have been

likely to make any difference in his trial or sentencing." *Anderson v. Collins,* 18 F.3d 1208, 1220 (5th Cir. 1994).

DeMoss's ineffective counsel claims are conclusory and without merit. For each of the alleged instances of ineffective assistance of counsel, DeMoss fails to demonstrate counsel was deficient or he was prejudiced by counsel's performance, and thus DeMoss's ineffective assistance of counsel claims are without merit. *See Anderson v. Collins,* 18 F.3d at 1221. Furthermore, because DeMoss failed to present a factual basis for these claims in state court, he is not entitled to a federal habeas corpus hearing. *See* 28 U.S.C. § 2254(e)(2).

In any event, in light of the evidence against DeMoss and his own admissions, any trial or counsel errors were harmless beyond a reasonable doubt. *See Brecht v. Abrahamson,* 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993) (a federal habeas court may not grant relief on trial errors unless petitioner demonstrates the error "had a substantial and injurious effect or influence in determining the jury's verdict").

Section 2254(d) requires this Court to defer to the state court's reasonable interpretations of federal law and reasonable determinations of fact. Factual determinations of a state court are "presumed to be correct" and the Petitioner has the burden of rebutting this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The State court's denial of DeMoss's claims is reasonably supported by the record and is consistent with federal law as required by § 2254(d), *Ex Parte DeMoss, supra,* at 1037-42, and therefore this Court is compelled to reach the same conclusion. DeMoss's Petition is without legal or factual merit and must be denied.

Furthermore, a habeas corpus petitioner is not entitled to relief or a hearing on his claims where: he failed to allege a basis for relief, he offers "conclusory allegations unsupported by specifics, contentions that in the face of the record are wholly incredible," *Perillo v. Johnson,* 79 F.3d 441, 444 (5th Cir. 1996), or allegations that can be resolved on the record, *Lawrence v. Lensing*, 42 F.3d at 258-59. DeMoss is not entitled to habeas relief or a hearing on his Petition because his claims are either conclusory or are refuted by the record.

III.

Accordingly, Respondent's motion to dismiss (Docket Entry # 9) is **GRANTED**; Petitioner DeMoss's Habeas Corpus Petition (Docket Entry # 2) is **DENIED**; and this case is **DISMISSED**. All other pending motions are **DENIED** as moot.

It is so ORDERED.

SIGNED this 11th day of February, 2003.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JAMES EDWARD DeMOSS,	§	
	§	
Petitioner,	§	**Civil Action**
	§	
v.	§	**No. SA-02-CA-139-FB**
	§	
JANIE COCKRELL, Texas Department of Criminal Justice Institutional Division Director,	§	
	§	
	§	
	§	
	§	
Respondent.	§	

ORDER

(Filed Mar. 21, 2003)

Before the Court is Petitioner James Edward DeMoss' Motion for Certificate of Appealability (Docket Entry # 12) to appeal the denial of his Habeas Corpus Petition.

Federal Rule of Appellate Procedure 22 states a certificate of appealability to appeal the denial of a habeas corpus petition shall be granted only upon "a substantial showing of the denial of a federal right." To make "a substantial showing of the denial of a federal right," the applicant must demonstrate that "reasonable jurists could debate whether (or, forth at matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"" *Slack v. McDaniel,* 529 U.S. 473, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542

(2000) (*citing Barefoot v. Estelle,* 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

Title 28 U.S.C. § 1915(a)(3) states leave to proceed on appeal in forma pauperis shall be denied if the district court determines the appeal is not taken in "good faith," i.e. if the appeal fails to present a nonfrivolous issue. *See Coppedge v. U.S.,* 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962). An issue is frivolous where there is no arguable legal or factual basis for the issue. *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Petitioner's Habeas Corpus Petition, challenging his convictions for aggravated sexual assault and inducing sexual performance by a child, was denied by this Court because the denial of his claims by the State habeas corpus court was reasonably supported by the record and federal law, and his claims were refuted by the record or were conclusory. This case fails to present an arguable issue for appeal.

For the reasons more fully stated in this Court's Memorandum Decision (Docket Entry # 10), Petitioner failed to present a non-frivolous issue for appeal or make a substantial showing of the denial of a federal right. Accordingly his Motion for Certificate of Appealability (Docket Entry # 12) is **DENIED**. Furthermore, because DeMoss' appeal is not taken in good faith, he is **DENIED** leave to appeal in forma pauperis. *See* 28 U.S.C. § 1915(a)(3).

It is so ORDERED.

SIGNED this 21 day of March, 2003.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50299

JAMES EDWARD DEMOSS

Petitioner-Appellant

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION

Respondent-Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

(Filed Sep. 19, 2003)

Before HIGGINBOTHAM, DAVIS, and PRADO, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for Certificate of Appealability and to proceed in forma pauperis. The panel has considered appellant's petition for en banc rehearing treated as motion for reconsideration of Certificate of Appealability. IT IS ORDERED that the motion is DENIED.

APPENDIX E

TEXT OF U.S. CONSTITUTION AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX F

TEXT OF U.S. CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX G

TEXT OF U.S. CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

TEXAS CODE OF CRIMINAL PROCEDURE

ARTICLE 38.23(a)

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitutions or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted into evidence against the accused on the trial of any criminal case.

APPENDIX I

TEXAS PENAL CODE 36.02 (BRIBERY)

(a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of official discretion as a public servant, party official, or voter; (2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official; (4) any benefit that is a political contribution as defined by Title 15, Election Code, or that is an expenditure made and reported in accordance with Chapter 305, Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision.

(b) It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or he lacked jurisdiction or for any other reason.

(c) It is no defense to prosecution under this section that the benefit is not offered or conferred or that the benefit is not solicited or accepted until after:

(1) the decision, opinion recommendation, vote, or other exercise of discretion has occurred; or

(2) the public servant ceases to be a public servant.

(d) It is an exception to the application of Subdivisions (1), (2), and (3) of Subsection (a) that the benefit is a political contribution as defined by Title 15, Election Code, or an expenditure made and reported in accordance with Chapter 305, Government Code.

(e) An offense under this section is a felony of the second degree.